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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-273

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL KREHER, AND MRS. FLORENCE JUNCKER, WIDOW OF DR. JOHN C. DERBOFEN,

Petitioners,

versus

T. L. JAMES AND COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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versus

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Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

In 1954, T. L. James & Company, Inc., respondent herein (sometimes hereinafter referred to as "James"), entered into a contract with the Louisiana

Department of Highways, currently the Department of Transportation and Development, for the construction of a base for Interstate Highway 10 through a portion of eastern New Orleans now known as Lake Forest. To obtain the quantity of fill material required, James negotiated with the late Joe W. Brown and was given permission to excavate several portions of the property which he owned in the general vicinity. One of these tracts included an area where he wished to have a lake because he intended to build his home at this location. At the time, the surrounding land was low, marshy, unprotected by levees and subject to tidal overflow. There was very limited access to the area and it was generally uninhabited.

The lake was dredged in 1957 and James compensated Mr. Brown for materials used in the construction on an agreed basis. It was subsequently determined, however, that a portion of the acreage excavated by James, known as Grove 57, actually belonged to Dr. and Mrs. John C. Derbofen. During the course of the dredging, James inadvertently dredged completely across the center of Grove 57, excavating about 80,025 cubic yards of fill material over a surface area of 2.236 acres. On October 30, 1958, following the death of Dr. Derbofen, Mrs. Derbofen and her daughter, Mrs. Violet Derbofen Kreher, filed suit No. 366-261 on the docket of the Civil District Court against James and others. Itemizing their damages to include soil removal, destruction of vegetation and trees, as well as deprivation of the full use and enjoyment of the premises to date, the plaintiffs sought a money judgment for the sum of $519,500, *reserving*

> *the right* to petitioners herein *to claim future damages for the continuing trespass* as set forth above, and that defendants herein be required to render and make petitioners' property safe and secure from future damage, *and* to remove water standing thereon, and generally undo the wrong which they have done, reserving to petitioners their right to claim *damages for indemnification* of necessary expenses to be incurred on account thereof in the event of defendants' failure to do so . . . . (*emphasis added*)

Paragraph XXII of said petition [respondent Appendix 1] further clarifies that the petitioners were reserving the right to claim "future damages" for what they believed to be a continuing trespass.

After dismissing all other defendants from the suit, the trial court rendered a judgment against James for the sum of $6,044, with legal interest from date of judicial demand until paid and for costs. Because the costs of restoration exceeded the value of the damaged property, it was concluded that the proper measure of damages should be the difference between the market value of the property as a whole before and after the injury. The trial judge also determined that the sole question at issue was the quantum of damages to be awarded.

On appeal, the Fourth Circuit Court of Appeal [sometimes hereinafter referred to as the "Fourth Circuit"] affirmed, but amended the lower court's judgment to increase the damages awarded to the sum of

$16,005. *See Derbofen v. T. L. James & Company, Inc.*, 148 So.2d 795 (La. App. 4th Cir. 1963) [petitioners Appendix 5]. The appellate court subscribed to the trial judge's finding that the trespass was in good faith and concluded that the evidence did not support a judgment for any amount on account of destruction of vegetation and trees or loss of use and enjoyment. It was also noted that the plaintiffs had not asked for severance damages, nor for damages incurred by reason of a diminution in the value of their property.

The Fourth Circuit acknowledged that it was being asked to enjoin or require James to remove the water standing on the plaintiffs' property and recognized that they had prayed for a reservation of their rights to claim future damages not only for the continuing trespass which they had alleged, but also for indemnification of necessary expenses to be incurred in the event the defendants failed to restore the property to its original condition. Although the injunctive relief sought was not granted, it was believed that the trial court had erred in using market value as the criteria for assessing damages in this case. For this reason, it awarded the plaintiffs $.20 per cubic yard, this figure being based substantially on the net profit realized by James on the dirt removed in the entire project. More importantly, however, the court further amended the judgment to reserve "plaintiffs' right to sue for *future damages as prayed for in their petition* . . . ." (*emphasis added*). In all other respects, the lower court was affirmed.

The plaintiffs thereafter applied unsuccessfully for a rehearing. Rather than seek review of this judgment

by the Louisiana Supreme Court, they filed another petition against James and others on December 2, 1963 in proceedings numbered 417-884 on the docket of the Civil District Court. In this petition [petitioners Appendix 4], the plaintiffs alleged that they had been injured by the continuing trespass and claimed damages for indemnification for necessary expenses to be incurred on account thereof, said expenses, totaling $476,000, being itemized as: (1) $25,000 for deprivation of the full use and enjoyment of the premises to date; (2) $410,000 for removal of water, restoration of the original contour and protection of boundaries; and, (3) 10% of the latter figure for engineering and contingencies.

In 1964, all of the defendants except James were dismissed from the suit on the basis of exceptions of *res judicata* and judicial estoppel. In 1969, James filed exceptions of prescription, *res judicata*, judicial estoppel and improper division of a cause of action. The trial judge sustained the exception of prescription, but overruled the others. On appeal from the judgment maintaining the exception, the Fourth Circuit reversed and held that since the same cause of action was asserted in each suit, prescription had been interrupted by the filing of the first. *See Kreher v. T. L. James & Company, Inc.*, 274 So.2d 734 (La. App. 4th Cir. 1973). James had answered the appeal for the purpose of overturning the trial court's denial of its other exceptions, but the Fourth Circuit refused to pass upon said exceptions until the relevant facts could be established.

On remand, the plaintiffs filed a supplemental and amending petition [respondent Appendix 2], in-

creasing the monetary relief sought to $1,322,000. The case was thereafter tried on the merits. On January 13, 1975, Judge Levy rendered judgment [petitioners Appendix 3] against James for the sum of $183,112.30. He realized that this would allow double recovery and was of the opinion that relitigation of the question of damages was precluded under the doctrine of *res judicata*. Nevertheless, he was compelled to conclude that the Fourth Circuit had reserved to the plaintiffs their right to sue for damages for the trespass, a continuing one in his view because that portion of Grove 57 now under water had been in continuous use and formed a corridor between those bodies of water on either side of the remainder of their property. For this reason, damages were measured as of the date of trial and interest assessed only from the date of judgment. Believing that the cost of restoration would be punitive and unjustified under all the facts and circumstances, the lower court rejected this method of reparation and awarded a sum calculated to represent the value of that portion of the land which had effectively been taken away from the plaintiffs by reason of the trespass. The court set the damages at $183,112.30 because 97,400 square feet of Grove 57 was covered by water and fully developed estate sites in the subdivision then surrounding Grove 57 sold for as high as $1.88 per square foot.

From this judgment, James timely perfected a suspensive appeal to which the plaintiffs filed an answer [respondent Appendix 3]. On April 6, 1977, a panel composed of Judges Lemmon, Boutall and Beer ordered that the case be reargued before a five judge panel, including Judges Samuel and Schott, in accor-

dance with Article V, Section 8(B) of the Louisiana Constitution of 1974. On October 20, 1977, a decree was handed down [petitioners Appendix 2] resulting in a judgment in the plaintiffs' favor for the sum of $1,494, together with legal interest from October 30, 1958 and all costs in both courts. Judges Lemmon and Beer, who authored what became the majority opinion, agreed with Judge Levy that the cost of restoration would not be an appropriate award under the facts and circumstances of this case.

It was determined, however, that the trial court erred in its failure to distinguish between a continuing trespass and a trespass which causes continuing injury by permanently changing the physical condition of the subject property. Accordingly, while they believed that the damage could most justly be repaired by awarding the full value of the virtually destroyed property, and would permit interest to accrue from the date of the first judicial demand, it was concluded that the plaintiffs were entitled to judgment only in the amount of the 1957 value of the property. The Fourth Circuit declined to question the validity of a $17,500 appraisal accepted by the trial court at the original hearing and, allowing James a credit for the amount previously paid, arrived at the $1,494 figure.

By reurging its exceptions of *res judicata*, estoppel by judgment and improper division of an obligation, however, James took the position that no additional damages were warranted. Despite the fact that the majority was of the opinion that *res judicata* would otherwise be applicable, these judges concluded, albeit reluctantly, that the exceptions were properly

overruled. According to their reasoning, they could not apply the doctrine to issues which a previous panel has refused to adjudicate. Although they recognized that the reservation of rights sanctioned effectively permitted an improper division of an obligation, they viewed the reservation as broad enough to encompass the additional damages ultimately awarded.

On January 5, 1978, the plaintiffs filed an application for rehearing and a request for rehearing *en banc*. Although James was not satisfied with the October 20, 1977 judgment, it did desire a final resolution of this twenty year controversy and, for this reason, filed a brief in opposition to this application and in support of the decree. The Fourth Circuit refused the rehearing, notice thereof being mailed by the Clerk on March 14, 1978.

While James did apply to the Louisiana Supreme Court for a writ of certiorari or review, it sought to overturn the Fourth Circuit's judgment only because it anticipated that the plaintiffs would ask for such relief and, for this reason, did so only on a conditional basis. In other words, its application was to be considered moot if the plaintiffs were unsuccessful in their efforts to obtain review by our highest state court. Both applications [petitioners Appendix 1, respondent Appendix 4] were denied on May 5, 1978.

James did not pursue a similar course of action in this Honorable Court, namely to seek certiorari should the petitioners prevail in this regard, because it has been counseled that neither 28 U.S.C. §1257, nor the jurisprudence interpreting this jurisdictional

provision, would support such a petition. Nevertheless, the petitioners have asserted that Rule 19 is applicable because their constitutional rights have been violated. The respondent opposes this petition and submits this brief in support of its opposition.

ARGUMENT

Federal Questions Not Reviewed By Lower Courts

The petitioners contend that the decision of the Fourth Circuit Court of Appeal *sub judice* violated their due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and that it also amounted to an *ex post facto* violation of Article I, Section 10. Rule 19(a) indicates that this Honorable Court will exercise its discretion and grant a review of a state court judgment on writ of certiorari only when the state court has decided a federal question of substance which it has not previously determined, or when the state court has decided that question in a way which conflicts with one of its prior decisions. Moreover, Rule 23(f) provides that the petition for certiorari shall specify such particulars as will demonstrate that the federal question sought to be reviewed was properly raised and passed upon by the courts below.

Accordingly, it is stated on page 2 of the petition that "no further review of the merits of the Federal claims made a part of this petition is available in any Louisiana Court." However, such a self-serving statement is not sufficient in and of itself to satisfy Rule 23(f). It is respectfully submitted that this requirement cannot be satisfied, and that their petition must be denied, because the claims founded upon federal law set forth therein are now being asserted for the first time.

Although it is their burden to do so, the petitioners have not included in their appendix either their brief in support of the request for rehearing *en banc* by the Fourth Circuit, or their application to the Louisiana Supreme Court for a writ of certiorari or review. Nevertheless, a review of the record will reflect that at no time during the proceedings below did the petitioners contend that the Fourth Circuit had violated their constitutional rights and guarantees. In order to avoid the rendition of advisory opinions, this Honorable Court has previously determined that, on review of a state court decision, it cannot decide issues raised for the first time. *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed. 2d 346 (1973); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398 (1969). In other words, a party must be seeking to *relitigate* a federal claim rejected or adversely determined in a completed state court proceeding. *Huffman v. Pursue, Ltd.*, 420 U.S. 597, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975). Due process claims are included, *see, e.g., Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed. 2d 642 (1973), and the principle is also applicable where review is sought by virtue of writ of certiorari. *City of East Lake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 96 S.Ct. 2358, 49 L.Ed. 2d 1332 (1976).

Therefore, this Honorable Court should not undertake to review what the lower courts have not decided. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). The opinions and other pleadings which are included in the petitioners' appendix do not establish that the subject federal questions were passed upon by the courts below. Unless they can affirmatively demonstrate otherwise, it must be assumed

that this omission was due to want of proper presentation. *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969). In addition, any doubts must be resolved against them in light of the long established principle that jurisdictional provisions should be strictly construed. *See, e.g., Key v. Doyle*, 434 U.S. 59, 98 S.Ct. 280, ___ L.Ed. 2d ___ (1977).

Non-Federal Grounds Supporting Judgment

As stated previously, it is certain that no federal questions of any type or description were ruled upon by the Louisiana courts which have considered this case. Assuming *arguendo* that they were properly presented for decision in the courts below, it has also been held that this Honorable Court has no jurisdiction if there are independent and adequate non-federal grounds to support the judgment. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed. 439 (1964); *Dixon v. Duffy*, 342 U.S. 33, 72 S.Ct. 10, 96 L.Ed. 46 (1951). In other words, the judgment of a state court cannot be revised on a question of state law. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408 (1965).

The decree about which the petitioners complain was indeed a decision reached according to state law. This case involves reparation of tort-caused damages to property under Article 2315 of the Louisiana Civil Code. The cost of restoration was rejected as the proper measure of damages. One reason given was that this would greatly exceed the enhanced value of the property. Both this analysis and result are supported by the jurisprudence. *See, e.g., Booth v. La. Highway Commission*, 171 La. 1096, 133 So. 169 (1931); *East v. Pan American Petroleum Corp.*, 168 So.2d 426

(La.App. 3d Cir. 1964). The value of the soil-in-place should be awarded where the good faith trespass consisted of the unauthorized removal of fill material. *See, e.g., Justice v. Bourgeois,* 288 So.2d 106 (La.App. 4th Cir. 1974); *Brady v. Rapides Gravel Company, Inc.,* 285 So.2d 832 (La.App. 1st Cir. 1973); *Gallo v. Sorci,* 221 So.2d 570 (La.App. 4th Cir. 1969).

Moreover, it is the respondent's position that the petitioners have failed to properly present the federal claims alleged herein to the Louisiana courts for resolution and, for these reasons, that this Honorable Court lacks jurisdiction to consider the case at bar. Should it be determined otherwise, however, this brief shall also address the merits of the petition for writ of certiorari, as well as certain allegations made therein.

Decision Rejecting Claim For Specific Performance Not Subject To Review

The petitioners concede that the courts in the original suit awarded them only the value of the soil removed although they had also prayed that James "be required to remove the water standing on their property . . . ." Furthermore, the Fourth Circuit reserved to the plaintiffs only "the right to sue for future damages as prayed for in their petition" and they elected to file the instant action rather than apply to the Louisiana Supreme Court for writs of certiorari or review. Yet, it is stated in the petition that said suit was filed to *enforce,* and the petitioners are continuing to seek, an injunction for removal of the lake, including restoration of the original contour of the property and further protection from erosion, or to recover damages in lieu thereof. Also, on page 18 of their original brief filed October 20, 1975 in answer to the respondent's suspensive appeal, it was acknowledged by the petitioners that the prior courts had given no consideration to their prayer for such relief.

It should be noted at the outset that damages, not specific performance, was the relief prayed for in the petition commencing this suit, No. 417-884 [petitioners Appendix 4], as well as the amendment thereto subsequently filed [respondent Appendix 2]. Also, the respondent submits that this injunctive relief was rejected both by the trial court in the first case and the 1962 panel of judges which reviewed its judgment on appeal. Although the petitioners are quick to point out that James to date has admittedly not attempted to remove the water standing on their property, they fail to note that it has nonetheless complied in all respects with any final and definitive judgment rendered against it in this matter.

Despite misrepresentations to the contrary made throughout these proceedings, *the respondent has never been required by judicial mandate to restore the property.* As a result of the first judgment, as amended, James has responded in damages totaling $16,005, plus four years of legal interest, for its inadvertent and unintentional trespass upon the petitioners' property. The petitioners have never contended that this judgment remains unsatisfied. Both the court of appeal and the trial court in the earlier suit specifically found that the respondent's actions in this regard were not deliberate, as argued by the petitioners.

As stated previously, the petitioners acknowledge that the courts in the first case failed to award them all the relief they prayed for in their petition. They mis-

takenly contend, however, that the court of appeal reserved to them their right to subsequently claim all forms of relief requested other than the value of the soil removed or that relief which was actually granted. It is respectfully submitted, however, that the courts in fact rejected the petitioners' demand for specific performance, either tacitly because no specific reference was made to that portion of their claim or explicitly because the reservation approved included only their right to sue for "damages."

In the absence of a special reservation, all issues which were presented by the pleadings will be considered as having been disposed of by final judgment and demands passed over in silence will be considered as having been rejected by the court. *See, e.g., Soniat v. Whitmer,* 141 La. 235, 74 So. 916 (1916); *Succession of Kelly v. Schauff,* 323 So.2d 243 (La.App. 1st Cir. 1975); *Walker v. Jones,* 230 So.2d 851 (La.App. 1st Cir. 1969); *aff'd,* 257 La. 404, 242 So.2d 559 (1970); *Lahitte v. Acme Refrigeration Supplies, Inc.,* 192 So.2d 172 (La.App. 4th Cir. 1966), *writ refused,* 250 La. 99, 194 So.2d 98, *cert. denied,* 389 U.S. 821, 88 S.Ct. 44, 19 L.Ed. 2d 73 (1967). In order to determine the scope of an ambiguous judgment generally or a reservation in particular, reference can be had to the entire record, including the pleadings and the written reasons for judgment. *See, e.g., Hughes v. Whitehead,* 329 So.2d 775 (La.App. 1st Cir. 1972); *Succession of Delesdernier,* 184 So.2d 37 (La.App. 4th Cir. 1966); *Lumbermens Mutual Casualty Company v. Younger,* 158 So.2d 341 (La.App. 3d Cir. 1963). Because no application was made to the Louisiana Supreme Court for review of that judgment, after a request for rehearing was denied, it became

definitive and acquired the authority of the thing adjudged. LSA-C.C.P. arts. 1841-1842, 2166; *Succession of Deste,* 254 La. 403, 223 So.2d 848 (1969).

In addition, matters once determined by a court of competent jurisdiction by final judgment can never be called into question by the parties, although said judgment might have been erroneous or irregular and liable to reversal if properly challenged. *See, e.g., California Company v. Price,* 234 La. 338, 99 So.2d 743 (1957); *Brown v. Globe Tool & Engineering Co.,* 337 So.2d 894 (La.App. 4th Cir. 1976) and cases cited therein; *Fontenot v. Pan Am. Fire & Cas. Co.,* 209 So.2d 105 (La.App. 3d Cir.), *writ refused,* 252 La. 460, 211 So.2d 328 (1968). For this reason, those judges who authored the majority opinion of the most recent panel of the Fourth Circuit permitted the reservation to stand despite the fact that it improperly sanctioned the splitting of a cause of action. It is clear that the petitioners did not include their request for specific performance in the reservation which they sought to have recognized. Because the judgments of the trial and appellate courts were silent with respect to this demand, the authorities hereinabove cited stand for the proposition that said demand has in fact been rejected. Such tacit rejection has the force and effect of *res judicata. Carney v. Hartford Accident & Indem. Co.,* 250 So.2d 776 (La.App. 1st Cir. 1971).

Therefore, the respondent cannot be required by court order to afford the petitioners this type of relief. Furthermore, it is axiomatic that one cannot be compelled to respond in damages for its failure to do something that it was not legally required to do. It is thus

contended that the petitioners are not entitled to recover any sum in the nature of indemnification of those expenses to be incurred should they choose to restore the property.

Nature And Extent Of Reservation

It is not disputed by the respondent that the 1962 panel of the Fourth Circuit reserved to the petitioners their right to thereafter claim damages for what they alleged to be a continuing trespass. This case does not involve a continuing trespass, however, *see, e.g., Perkins v. Simon,* 265 So.2d 804 (La.App. 3d Cir. 1972), and the cost of restoration was not an appropriate measure of damages in any event. Also, assuming for the sake of argument that they have reserved the right to recover future damages in the nature of reparation, other than for a continuing trespass, said damages could include only those items alleged and sought to be proven at the latest trial, namely damages for erosion and the amount claimed to make the remaining property safe and secure. Both the trial court and court of appeal explicitly or tacitly rejected this demand.

It is contended by the petitioners that the Fourth Circuit guaranteed by reservation their right to future damages, but subsequently denied this right and thereby deprived them of due process under the Fifth and Fourteenth Amendments of the United States Constitution. *Jensen v. Olson,* 353 F.2d 825 (8th Cir. 1965), is illustrative of the principle that only "rights" are protected by due process guarantees. It appears that the petitioners at this stage of the proceeding wish to disregard their earlier awareness of the distinction between the right to sue and the right to ultimately recover. By permitting the reservation in question,

the court did not recognize that they had any such rights, but simply postponed a decision with respect to same until a subsequent point in time. *See, e.g., Gumbel v. New Orleans Terminal Co.,* 197 La. 439, 1 So.2d 686 (1941). On page 19 of their original brief in answer to the respondent's suspensive appeal, however, it was said that the reservation served only to allow them "the right to later litigate these issues."

Aside from other considerations, it is evident that the petitioners have been given their "day in court" by virtue of the fact that an additional $1,494 in damages has been awarded. It cannot be said, therefore, that the court of appeal refused to "hear" or "entertain" their claim for damages. The court did not breach any agreement or fail to keep its promise, as claimed by the petitioners, but merely interpreted said reservation in a matter adverse to their interests. The petitioners' statement on page 11 of the petition for writ of certiorari, that the court promised them the "right to sue for removal of the lake," is simply not true. Their reliance upon this belief, if any, was misplaced.

The petitioners also challenge the court's decision as being tantamount to an unconstitutional *ex post facto* act by the legislature. In *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed. 2d 260 (1977) [citation partially omitted in petition], it was held by this Honorable Court that the due process clause of the Fifth Amendment offers protection against judicial action of this nature. The petitioner has cited no authority, nor can the respondent find any, however, for the proposition that this limitation should be extended to non-criminal matters.

The cases cited by the petitioners are distinguishable on factual or other grounds. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 40 L.Ed. 2d 427 (1971) involved the promise of a prosecutor, as part of a plea bargaining agreement, not to make a recommendation as to sentence. *Amos Treat & Co. v. Securities & Exchange Commission*, 113 U.S. App. 100, 306 F.2d 260 (D.C. Cir. 1962) [306 F.2d 269 in petition] dealt with the issue of bias and whether a commissioner should recuse himself due to the fact that he had conducted examinations of the entity under consideration while serving that administrative agency in another capacity. *Jensen v. Olson, supra*, concerns the discharge of a public employee for conduct alleged to be constitutionally protected.

Concurrence To Render Judgment

Finally, *Marks v. United States, supra*, resolved a dispute concerning application of certain obscenity standards or guidelines. Furthermore, this Honorable Court was also called upon to determine the holding of a particular case where no single rationale explaining the result was approved by at least five justices. The petitioners have challenged the manner in which the Fourth Circuit arrived at the decree which is the subject of their petition for writ of certiorari. It is respectfully submitted, however, that Section 8(B) of Article 5 of the Louisiana Constitution of 1974 is dispositive of this particular issue. That section provides as follows:

> A majority of the judges sitting in a case must concur to render judgment. However, when a judgment of a district court is to be modified or reversed and one judge dissents, the case shall be reargued before a panel of at least five judges prior to rendition of judgment, and a *majority must concur to render judgment.* (*Emphasis added*).

It is beyond dispute that the decree in question was in fact signed by Judges Lemmon, Beer and Schott, a majority of the five-judge panel. As stated by Judges Lemmon and Beer in their concluding remarks addressed to this issue, "[t]here is no doubt as to the decree, and the disagreement as to why this decree resulted from the votes does not affect the decree itself." *See* petitioners Appendix 2, p. 5a.

Even Judges Samuel and Bouttall, who refused to sign the decree, confirmed that a majority has in fact concurred to render judgment. According to Judge Samuel, this decree became a majority decree and the "judgment of the court simply because Judge Schott stated that he concurred in the $1,494 award . . . ." *See* petitioners Appendix 2, p. 9a. Judge Samuel also agrees with respondent's contention that the opinions, wherein the judges set forth their various reasons for supporting or objecting to the decree, must be considered *dicta*. Judge Bouttall specifically acknowledged a concurrence in the decree by three judges and the fulfillment of the constitutional mandate imposed. Finally, Judge Schott has made the unequivocal statement that "it is the decree of the court in which I concur . . . .". *See* petitioners Appendix 2, p. 6a. The preface to this opinion further indicates his intention in this regard. Moreover, he took this course of action with the knowledge that he viewed the votes of Judges Bouttall and Samuel differently than they did.

CONCLUSION

This Honorable Court has recently asserted that its only "power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed. 2d 768 (1977), *citing, Wilson v. Lowe's, Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 2d 519 (1958). The respondent opposes this petition for writ of certiorari because it believes that this Honorable Court lacks jurisdiction to review the judgment in question. Initially, the petitioners have failed to satisfy Rule 23(f) which requires a showing that the federal questions were properly raised in the courts below. These constitutional arguments are now being made for the first time.

In any event, after twenty years of litigation, the petitioners are hard pressed to contend that they have not received a fair trial. Although the earlier panel of the Fourth Circuit Court of Appeal tacitly rejected their request for injunctive relief, a decision which has the full force and effect of *res judicata* because they decided not to seek review by the Louisiana Supreme Court, that panel did reserve to them their right to file suit for certain additional damages. The October 20, 1977 award of $1,494 demonstrates that the earlier commitment was in fact honored by the panel of judges which most recently considered this case. However, the petitioners were not guaranteed the right to recover and other claims for damages were rejected as inappropriate or because the petitioners had failed to sustain their burden of proof. In addition, this result was "approved" by a majority of the panel

of judges within the meaning of Article 5, Section 8(B) of the 1974 Louisiana Constitution.

On the basis of the foregoing, T. L. James & Company, Inc., respondent herein, asks that this petition for writ of certiorari be denied, at the petitioners' cost.

Respectfully submitted:

Paul E. Hurley
P. J. Stakelum, III
John J. Brennan, III
HURLEY, McNULTY,
STAKELUM & O'CONNOR
2002 Lykes Center
New Orleans, Louisiana 70130
Telephone: (504) 581-3324

Attorneys for Respondent,
T. L. James & Company, Inc.

CERTIFICATE OF SERVICE

In accordance with Rules 24 and 33 of the Rules of the Supreme Court of the United States, I hereby certify that I have served three copies of the foregoing Brief in Opposition to Writ of Certiorari on Abbott J. Reeves, 410 Derbigny Street, Gretna, Louisiana 70053, counsel of record herein for petitioners, by depositing same in the United States mail, with first class postage prepaid, this ____ day of September, 1978.

PAUL E. HURLEY

APPENDIX 1

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 366-261 DOCKET 4

Mrs. Florence Juncker, widow of Dr. John C. Derbofen, and Mrs. Violet M. Derbofen, wife of Gail T. Kreher

versus

T. L. James & Company, Inc.; Joe W. Brown; George Dallas Williams; and T. M. Dorsett

Filed Oct. 30, 1958. /s/ J. C. LAWLER
Dy. Clerk

TO THE HONORABLE, THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The petition of Mrs. Florence Juncker, widow of Dr. John C. Derbofen, and Mrs. Violet M. Derbofen, wife of Gail T. Kreher, both of lawful age and residents of and domiciled in the Parish of Orleans, State of Louisiana, with respect, represents:

I

That T. L. James & Co., Inc., defendant herein, is a corporation organized under the laws of Louisiana, domiciled in Ruston, Louisiana.

II

That Joe W. Brown, defendant herein, is of lawful age and a resident of the Parish of Orleans, State of Louisiana.

III

That George Dallas Williams, defendant herein, is of lawful age and a resident of the Parish of Orleans, State of Louisiana.

IV

That T. M. Dorsett, defendant herein, is of lawful age and a resident of St. Bernard Parish, State of Louisiana.

V

That the defendants are indebted individually and in solido to your petitioners in the sum of Five Hundred Nineteen Thousand, Five Hundred and No/100 ($519,-500.00) Dollars hereinafter itemized for the reasons alleged herein.

VI

That petitioners are the owners of five acres of land situated in the Third District of the City of New Orleans, Parish of Orleans, State of Louisiana, described as follows:

"A CERTAIN PORTION OF LAND, together with the buildings and improvements thereon,

rights, ways and privileges thereunto belonging, or in any wise appertaining, situated in the Third District of this City, designated as Grove 57 in Section 25 of New Orleans Lake Shore Land Company Tracts, according to the official map of said tracts on file in the office of E. K. Leverich, Notary Public, under date of December 11, 1918." As will more fully show by the judgment of possession rendered and dated _____ in the Succession of Dr. John C. Derbofen, and duly recorded in C.O.B. ____ folio ____ of the records of the Register of Conveyances of the Parish of Orleans, State of Louisiana.

VII

That petitioners were placed in possession as bona fide title owners of the land described herein on and have timely paid taxes assessed annually thereon, when due, and that they have never sold, nor removed any soil, sand, clay, mud, etc. from the land, and no right to remove or excavate soil, sand, clay, mud, etc. from said land was outstanding at the date of acquisition on the date herein stated, and that none was ever granted by petitioners herein since said date.

VIII

That in Mid January of the year 1958, and not before, petitioners were informed that excavation had been made from petitioners' said property, creating a borrow pit to the extent of 2.232 acres of said 5 acre tract, and that the excavated material consisting of

soil, sand, clay, mud, etc. had been removed tortiously, wrongfully, and illegally during the years 1956 and 1957 by some persons unknown to them.

IX

Petitioners, through their attorney, Gail T. Kreher, promptly made inquiry and investigations to determine the name or names of the person or persons who tortiously and wrongfully appropriated, excavated, removed and converted soil, sand, clay, mud, etc. aforesaid from the land described in Paragraph VI.

X

Petitioners are informed and believe, and therefore allege upon such information and belief, that Joe W. Brown, defendant herein, is the owner of Groves Nos. 35 - 37 - 39 - 41 - 43 - 45 - 47 - 49 - 51 - 53 - 55 and 59 of Section 25 of the "New Orleans Lakeshore Land Company Tract" located in the Third District of the City of New Orleans, State of Louisiana.

XI

Petitioners are informed and believe, and therefore allege upon such information and belief, that Joe W. Brown granted and gave unto George Dallas Williams, for valuable consideration, the right to excavate and use earth surface area, of a portion of the lands owned by said Joe W. Brown as set forth in Paragraph X of this petition, or in the alternative, and only in the alternative, that Joe W. Brown sold said property to George Dallas Williams so that said ex-

cavation could be made, and agreed to repurchase same after soil, sand, clay, mud, etc. was removed, and repurchased same.

XII

Petitioners are informed and believe, and therefore allege upon such information and belief, that defendant, T. L. James & Company, Inc. contracted and agreed with the State of Louisiana, Department of Highways, on November 11, 1955 to provide and furnish all materials, equipment and labor and perform the work required to build, construct and complete State Project No. 419-01-01, entitled New Orleans Little Woods Highway, Route No. 2236 (old), Parish of Orleans, State of Louisiana, in accord with said contract.

XIII

Petitioners are informed and believe, and therefore allege upon such information and belief, that T. L. James & Company, Inc., defendant herein, was required to make their own arrangements to secure material for roadbed and/or embankments, consisting of special borrow excavation (Base) and (Granular) and that materials so furnished were to be secured from any source, and that rights to excavate Special Borrows were NOT to be furnished by the Department of Highways of the State of Louisiana.

XIV

Petitioners are informed and believe, and therefore allege upon such information and belief, that T. L.

James & Company, Inc. has executed said contract and obtained materials mentioned in Paragraph XIII of this petition from a Borrow Pit, located in Section 25 of the New Orleans Lake Shore Land Company Tract, described more fully in a drawing, certified correct May 6, 1958, by F. C. Gandolfo, Surveyor, New Orleans, Louisiana, a copy of which is attached hereto, and that material removed from petitioners' property was co-mixed with materials used in constructing the road-bed and/or embankments of the project mentioned in Article XII hereof, and that defendants have received payment or consideration therefor.

XV

Petitioners are informed and believe, and therefore allege upon such information and belief, that the four defendants named herein have in concert and bad faith tortiously, knowing or having every opportunity to have known, wilfully trespassed upon petitioners' property and wilfully and wantonly removed, or caused to be removed, by excavation as aforesaid soil, sand, clay, mud, etc. from petitioners' property aforesaid, and appropriated same wrongfully and converted same to their own use and benefit, and sold same to the State of Louisiana, Department of Highways and others, causing damage to your petitioners and unjustly enriching defendants, set forth as follows:

1) Removal of approximately 245,000 cubic yards of soil, sand, clay, mud, etc. @ $2.00 per cubic yard	$490,000.00

2) Destruction of vegetation and trees	4,500.00
3) Depriving petitioners of full use and enjoyment of premises to date	25,000.00
	$519,500.00

XVI

Petitioners are informed and believe, and therefore allege upon such information and belief, that on 2.232 acres of petitioners' property there is left standing a deep body of water which is not contained, enclosed nor protected, constituting a hazard to the safety of petitioners and to the public, being a nuisance and causing further erosion of soil from petitioners' land, and making establishment of boundaries of petitioners' property a virtual impossibility, and that said trespass is continuing at the present time, depriving petitioners of their right to use and enjoy their property and making a large portion thereof inaccessable.

XVII

Petitioners are informed and believe, and therefore allege upon such information and belief, that the defendants herein have committed, or procured the commission of the trespass set forth in Paragraphs XV and XVI hereof, with full knowledge at all times of the trespass so committed.

XVIII

Petitioners are informed and believe, and therefore allege upon such information and belief, that defen-

dant, Joe W. Brown, is the owner of hundreds of acres of ground in Section 25 of the New Orleans Lakeshore Land Company Tract, in addition to the tracts specified in Article X of this petition, and that the defendants herein had many other sites upon which to conduct such excavation operations and that in locating the borrow pit and/or allowing excavations in the area of land set forth in Article XI hereof, that said Joe W. Brown and the other defendants herein used said property in a manner which was of detriment to the adjoining owner, plaintiffs herein, knowing and having available other property which would have been equally suitable for said purpose without disturbing petitioners herein by causing and maintaining a nuisance on petitioners' property as aforesaid.

XIX

Petitioners are informed and believe, and therefore allege upon such information and belief, that at all times during which the above mentioned excavations were made, that the machinery used and order for such use were wholly under the control of defendants herein, or their agents or employees.

XX

Petitioners are informed and believe, and therefore allege upon such information and belief, that no accurate statement of accounting for property converted and sold as set forth herein has been made as of the date of filing this suit.

XXI

Petitioners are informed and believe, and therefore allege upon such information and belief, that no effort has been made by defendants to remove the water from petitioners' premises, nor to make same safe and secure from future damages as of the date of filing this suit.

XXII

That petitioners reserve the right to claim future damages for the continuing trespass as set forth above, and for every relief that may be appropriate in the premises.

XXIII

That petitioners desire to propound to the defendant, T. L. James & Company, Inc., in this suit interrogatories on facts and articles, to be answered in writing, under oath, and categorically by the said defendant, and that they annex to this petition the said interrogatories on facts and articles proposed to be answered.

WHEREFORE, petitioners pray that T. L. James & Company, Inc.; Joe W. Brown; George Dallas Williams and T. M. Dorsett, defendants herein, be duly cited to appear and answer this petition, and that they be served with a copy of same, and that defendant, T. L. James & Company, Inc., to answer in writing, under oath, and categorically, within the delay fixed by law, the hereto annexed interrogatories on facts and ar-

ticles, and that after due proceedings had, there be judgment in favor of petitioners, and against the said defendants, individually and in solido, in the sum of Five Hundred Nineteen Thousand, Five Hundred and No/100 ($519,500.00) Dollars, with legal interest from judicial demand, and reserving the right to petitioners herein to claim future damages for the continuing trespass as set forth above, and that defendants herein be required to render and make petitioners' property safe and secure from future damage, and to remove water standing thereon, and generally undo the wrong which they have done, reserving to petitioners their right to claim damages for indemnification of necessary expenses to be incurred on account thereof in the event of defendants' failure to so do; and for all orders and decrees that may be necessary in the premises; for all costs; and for all general and equitable relief that may be appropriate in the premises.

/s/ GAIL T. KREHER
Gail T. Kreher
805 Hibernia Bank Building
New Orleans, Louisiana
Attorney for Petitioners

Serve Defendants:

T. L. James & Co., Inc., Ruston, La.
through James C. Love or
Gerald I. Dyson,
designated agents

Joe W. Brown
Pere Marquette Building
New Orleans, La.

George D. Williams
370 Bellaire Drive
New Orleans, La.

T. M. Dorsett
c/o Joe Brown's Horseshoe Ranch
Paris Road
New Orleans, La.

STATE OF LOUISIANA
PARISH OF ORLEANS

Before me, the undersigned authority, personally came and appeared, Gail T. Kreher, who, being first duly sworn, did depose and say:

That he is the attorney for the petitioners in the foregoing petition, and that to the best of his knowledge, information and belief all the allegations therein contained are true and correct.

/s/ GAIL T. KREHER

Sworn to and subscribed before me, this 30th day of October, 1958.

/s/ PETER G. CHARBONNET, JR.
NOTARY PUBLIC

ORDER

Let the defendant, T. L. James & Company, Inc., be cited to appear and to answer in writing, under oath, and categorically, within the delay fixed by law, the hereto annexed interrogatories on facts and articles, the whole as within prayed for and according to law.

New Orleans, La., 30th day of October, 1958.

/s/ A. E. RAINOLD
JUDGE

A TRUE COPY
/s/ H. FELL
Deputy Clerk,
Civil District Court
Parish of Orleans
State of LA

APPENDIX 2

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

No. 417-884 Division "D" Docket No. 4

VIOLET M. DERBOFEN, wife of/and
GAIL T. KREHER

versus

T. L. JAMES AND COMPANY, INC.

Filed: Nov. 21, 1974

MOTION TO AMEND PETITION

The supplemental and amending petition of Violet M. Derbofen, wife of/and Gail T. Kreher, plaintiffs in the above entitled and numbered cause, respectfully represent that the plaintiffs desire to supplement and amend their original petition filed herein on the 2nd day of December, 1963, in the following respects:

1. By amending paragraph VIII to read as follows:

VIII.

"That the defendants are indebted individually and in solido to your petitioners in the sum of one million three hundred twenty-two thousand and 00/100 dollars ($1,322,000.00)."

2. By amending paragraph XXVI to read as follows:

XXVI.

"Petitioners are informed, believe and therefore allege upon such information and belief that they have been damaged by the continuing trespass as set forth and claim damages for indemnification for necessary expenses to be incurred on account thereof, as follows:

(1) Removal of water from petitioners' property and restoring original contour of tract by filling area now under water with suitable material, protecting boundaries fronting on lake owned by adjoining owner Brown with sheet piling.

(2) 10% for engineering and contingencies.

(3) Depriving petitioners of full use and enjoyment of premises to date."

TOTAL $1,322,000.00

3. By amending the prayer to read as follows:

"WHEREFORE, petitioners pray that T. L. James and Company, Inc., The Succession of Joe W. Brown, No. 368-952, Civil District Court, Orleans Parish, Louisiana, Mrs. Dorothy Dorsett Brown, individually and as testamentary executrix of the Succession of Joe W. Brown, George Dallas Williams, Sabine Dredging and Construction Company, Inc., and T. M. Dorsett, be

duly cited to appear and answer this petition, and that they each be served with a copy of same, and that after due proceedings had, there be judgment in favor of petitioners and against the said defendants, individually and in solido, in the sum of one million three hundred twenty-two thousand and 00/100 dollars ($1,322,000.00), with legal interest from judicial demand, and for all orders and decrees that may be necessary in the premises; for all costs; and for all general and equitable relief that may be appropriate in the premises."

WHEREFORE, petitioners, reiterating the prayer of their original petition as though set forth at length herein, pray that their original petition be supplemented and amended in the above particulars and that after due proceedings had there be judgment herein in favor of the petitioners, Violet M. Derbofen, wife of/and Gail T. Kreher, and against the defendant, T. L. James and Company, Inc., as originally prayed for herein.

Respectfully submitted,

JOHN M. MAMOULIDES, ESQ.
GAIL T. KREHER, ESQ.
CO-COUNSEL FOR PLAINTIFFS
/s/ JOHN M. MAMOULIDES
JOHN M. MAMOULIDES, ESQ.

Please serve defendant:

T. L. James and Company, Inc. et al
through Paul E. Hurley, Esq.
Hurley, McNulty & Stakelum
2002 Lykes Center
New Orleans, LA 70130
Attorney for T. L. James & Co., Inc.

A TRUE COPY
/s/ A. C. WETMORE
Deputy Clerk,
Civil District Court

[SEAL]

ORDER

Let the foregoing supplemental and amending petition be filed as prayed for.

New Orleans, Louisiana, this 21st day of Nov., 1974.

(Sgd) S. Sanford Levy
JUDGE

APPENDIX 3

COURT OF APPEALS
FOURTH CIRCUIT
STATE OF LOUISIANA

MRS. VIOLET M. DERBOFEN, wife of GAIL T. KREHER, and MRS. FLORENCE JUNCKER, widow of DR. JOHN C. DERBOFEN,
Plaintiffs-Appellees,

versus

T. L. JAMES & COMPANY, INC., et al
Defendants-Appellants

ANSWER TO APPEAL
(Pursuant to La. C. Civ. P. Article 2133)

Filed: Jul. 14, 1975

NOW INTO COURT, through their undersigned co-counsel, John M. Mamoulides, Esq., Gail T. Kreher, Esq., and Abbott J. Reeves, Esq., comes Mrs. Violet M. Derbofen, wife of Gail T. Kreher, and Mrs. Florence Juncker, widow of Dr. John C. Derbofen, and appellees in the above entitled and numbered cause and for answer to the appeal filed herein by T. L. James and Company, Inc., et al, and made returnable into this court on the 28th day of July, 1975, says:

1. The trial court erred by not using as a basis for its judgment in favor of the plaintiffs-appellees the estimated cost of removing of water from plaintiffs-appellees' property and

restoring original contour of the tract by filling area now under water with suitable material, protecting boundaries fronting on lake with sheet piling, to make premises safe and secure to prevent future damages, and for engineering fees and contingencies and depriving the plaintiffs-appellees of full use and enjoyment of their premises to date that is the amount of One million three hundred twenty-two thousand dollars ($1,322,000.00). (See Kreher Exhibit #13.)

2. The trial court erred by not allowing interest on the judgment to be calculated from date of actual illegal removal of soil, that is on or about December 23, 1957.

WHEREFORE, plaintiffs-appellees pray that the judgment appealed from be amended by increasing the amount allowed plaintiffs-appellees to One million three hundred twenty-two thousand dollars ($1,322,000.00) plus interest from December 23, 1957, and that as thus amended the said judgment be affirmed and that defendants-appellants be condemned to pay the costs incurred in both courts.

/s/ ABBOTT J. REEVES
ABBOTT J. REEVES, ESQ.
JOHN M. MAMOULIDES, ESQ.
GAIL T. KREHER, ESQ.
CO-COUNSEL FOR
PLAINTIFFS-APPELLEES
1012 FOURTH STREET
GRETNA, LOUISIANA 70053
Telephone: 362-6688

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing answer to appeal has been mailed to Paul E. Hurley, Esq. and P. J. Stakelum, III, Esq. of Hurley, McNulty and Stakelum, 2002 Lykes Center, New Orleans, Louisiana, 70130, this 14th day of July, 1975.

/s/ ABBOTT J. REEVES
ABBOTT J. REEVES, ESQ.

APPENDIX 4

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL T. KREHER AND MRS. FLORENCE JUNCKER, WIDOW OF DR. JOHN C. DERBOFEN

versus NO. 62,025

T. L. JAMES AND CO., INC. SUCCESSION OF JOE W. BROWN, NO. 368-953, CIVIL DISTRICT COURT, ORLEANS PARISH OF LA., MRS. DOROTHY DORSETT BROWN, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOE W. BROWN, GEORGE DALLAS WILLIAMS, SABINE DREDGING AND CONSTRUCTION CO., INC. AND T. M. DORSETT

In re: T. L. James and Company, Inc., applying for Certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans.

Denied.

JWS

AT, Jr.

JAD

PFC

WFM

JLD

A TRUE COPY
Clerk's Office
Supreme Court of La.
New Orleans
/s/ FRANS LABRANCHE
Clerk